

BEFORE THE
SURFACE TRANSPORTATION BOARD



BNSF RAILWAY COMPANY --
PETITION FOR DECLARATORY
ORDER

) FINANCE DOCKET
) NO. 35164

225223

BNSF RAILWAY COMPANY --
ABANDONMENT EXEMPTION -- IN
OKLAHOMA COUNTY, OK

) DOCKET NO. AB-6
) (SUB-NO. 430X)
)

PETITION FOR RECONSIDERATION

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JUN 8 - 2009

SURFACE
TRANSPORTATION BOARD

Petitioner

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PETITION FOR RECONSIDERATION

Pursuant to the Board's decision in these proceedings served May 20, 2009, ordering paragraph 6 at page 15, JOHN KESSLER (Mr. J. Kessler) hereby petitions for reconsideration of that decision.^{1/}

THE BOARD DECISION

After unsuccessfully attempting to abandon certain trackage located at Oklahoma City, OK, BNSF Railway Company (BNSF) filed a Petition for a Declaratory Order in Finance Docket No. 35164 seeking a determination that its removal of that trackage and rerouting of traffic that formerly was originated or terminated on that trackage would be a relocation of trackage not adversely affecting service to shippers, which does not require Board abandonment authority.

^{1/} Mr. J. Kessler is a party in Finance Docket No. 35164, having filed a Reply to BNSF's Supplement Comments in that proceeding on November 6, 2008 in which his interest in the proceeding was described (at 2). Mr. J. Kessler is so described to differentiate him from his brother, Mr. Edwin Kessler, who is also a party in that proceeding.

BNSF's Petition engendered substantial opposition. Some opponents claimed that the action contemplated by BNSF would not constitute a legitimate relocation of trackage. Mr. J Kessler's opposition was based on the contention that even if the BNSF proposal qualified as a relocation of trackage, Board authorization was required for abandonment and removal of the trackage because such removal would adversely affect Boardman, Inc. (Boardman) and any other future shipper on the "western segment" by isolating them from the national rail system.

The Board granted BNSF's Petition in part by finding that BNSF's proposed action regarding trackage referred to as the "eastern segment" would be a track relocation that does not require Board authorization (decision at 8-9).

While the Board declined to grant BNSF's Petition as to trackage referred to as the "middle segment" (decision at 9-10), the Board, on its own motion, granted exemptions to BNSF for abandonment of that trackage and for bypassing the offer-of-financial-assistance (OFA) provisions of 49 U.S.C. § 10904. (*Id.* at 10-12).

PROCEDURAL IRREGULARITY

The Board has treated its decision as an administratively final action of the entire Board, for which only a discretionary appeal is permissible under 49 C.F.R. § 1115.3(a). (Decision, ordering paragraph 6 at 15, requiring the filing of a petition for stay prior to the effective date of the decision).

Mr. Kessler respectfully submits that such treatment is not procedurally appropriate where, as here, the Board has taken action that was not sought by any party (i.e., exemption from abandonment and OFA provisions), as a result of which the parties have not had an opportunity to address the issues associated with that action. The issues associated with exemption from

abandonment and OFA provisions are distinct from, and altogether different than, the issues associated with relocation of trackage. While the Board's action on its own motion here is an "entire Board action," it should not be considered to be administratively final for appellate purposes until the parties have had their first opportunity to address the issues associated with that action.

Accordingly, the Board should treat this Petition for Reconsideration as a timely-filed appeal of an initial Board action on its own motion that will stay the effect of the Board's action pending determination of the appeal.

MATERIAL ERROR

In order to exempt a transaction from a statutory requirement under 49 U.S.C. § 10502(a), a required finding is that application of that requirement is not necessary to carry out the transportation policy of 49 U.S.C. § 10101. The rail transportation policy most directly placed at issue by a rail abandonment is 49 U.S.C. § 10101(4), "to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public and the national defense." In exempting abandonment of the "middle segment" from the requirement of approval under 49 U.S.C. § 10903, the Board did not even mention that rail transportation policy.

The issue with respect to that transportation policy is whether the "middle segment" is required in order to provide rail service to Boardman, Inc. and to other shippers that may locate, or have located, on the segment of trackage to the west of the middle segment (i.e., the "western segment"). If those shippers are assured of continued rail service by shipping or receiving by rail to or from their west, that issue might be resolved in the negative. It is far from clear, however, that such rail service to or from the west is available to those shippers.

As brought out in Mr. J. Kessler's Reply to BNSF's Supplemental Comments, filed on November 6, 2008, (at 4-5 and Appendices 1 and 2), BNSF has taken the following actions that have made it impossible for Boardman and other shippers on the western segment to access the national rail system by shipping or receiving by rail to or from their west:

- (1) BNSF has removed substantial trackage and signal boxes on the western segment in the area of South Agnew Street; and
- (2) BNSF has removed the diamond that permitted the western segment to cross BNSF's Packingtown Lead trackage, thereby preventing operation over the western segment west of that Lead trackage; and
- (3) BNSF has permitted a large traffic signal mast for South Agnew Street to be located in concrete poured in the center of the right-of-way of the western segment.

Notwithstanding those impediments to rail service over the western segment, the Board found that Boardman would continue to receive local service if the middle segment were to be abandoned, viz. decision at 10:

... the three existing shippers on the adjoining segments (one of which is Boardman on the western segment) will continue to receive local service ...

Nowhere else in its discussion of exemption from 49 U.S.C. § 10903 did the Board attempt to explain how Boardman or any other shipper on the western segment would continue to receive local service when the middle segment would be abandoned and the western segment west of the shipper facilities is barricaded by a traffic signal mast and is disabled as a result of removal of trackage, signals, and diamond. (Decision at 10-11).

Elsewhere in the decision, the Board touched on the issue in a conclusory manner, viz.,
decision at 8:

... Several parties have alleged that Boardman, located on the western segment, will be adversely affected by the removal of the track on the middle segment. Boardman itself, however, has stated that it does not believe it would be affected, as long as it continues to have access to rail service from the west. BNSF has explained how Boardman will continue to have access to rail service from the west ... ^{2/}

The Board's apparent reference to BNSF's explanation of service to Boardman from the west is to the following at page 6 of the decision

... BNSF states that it has reached a tentative agreement with SLWC (Stillwater Central) for the latter to relocate a signal mast (footnote omitted) located at the intersection of the Chickasha Line and Packingtown Lead and to repair the tracks leading to Boardman.

At page 6 of his Reply to BNSF's Supplemental Comments filed on November 6, 2008, Mr. J. Kessler showed why that BNSF "explanation" is no explanation at all, and is not entitled to weight in resolving the issues in the proceeding, viz.:

... BNSF has not explained the nature of its alleged "tentative agreement" with Stillwater. What makes the arrangement "tentative"? Stillwater has not filed or stated anything that would confirm its part in any such "arrangement". Does the "arrangement" to "repair the tracks" include installation of a crossing diamond and replacement of removed trackage? For all that appears in BNSF's Supp. Comments, the arrangement may be tentative because it is contingent on an event that is impossible to happen.

^{2/} Boardman's position was predicated on the availability of rail service from the west. Abandonment of the middle segment should be thus conditioned on a requirement that rail service from the west be made currently available to Boardman. While Boardman also stated that transload service would be acceptable, it is likely that Boardman assumed that rail-truck transload service would be performed at the same cost as direct rail service. That surely would not be the case inasmuch as transload service is known to be considerably more costly than direct rail service.

In its decision in this matter, the Board did not acknowledge that criticism which undermines BNSF's purported "explanation" of how service would be provided to Boardman from the west, and instead gave full weight to BNSF's allegations. That was material error. The BNSF allegations are far too vague and indefinite to provide a valid evidentiary basis for a finding that Boardman or any other shipper on the western segment will have access to the national rail system by means of shipping or receiving to or from the west. The absence of evidentiary support for that finding undermines the Board's ultimate finding that application of 49 U.S.C. § 10903 to BNSF's abandonment of the middle segment is not necessary to carry out the national rail policy of 49 U.S.C. § 10901.

Currently-available rail service to the west from the western segment is thus shown to be an essential element of any rational finding that exemption of abandonment of the middle segment would be consistent with the national rail policy. That essential element can only be attained if full restoration of rail service to the west of the western segment is imposed as a condition to exemption of abandonment of the middle segment.

Accordingly, on reconsideration, the Board should impose a condition to exemption of the middle segment that BNSF and/or Stillwater Central first fully restore rail service to the west of the western segment by removing the traffic signal mast from the rail line and by replacing the removed trackage, signal boxes, and crossing diamond.

Respectfully submitted,

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DUE DATE: June 9, 2009

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2009, I served the foregoing document, Petition For Reconsideration, by first-class, U.S. mail, postage prepaid, on all parties of record.

Thomas F. McFarland

Thomas F. McFarland